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IN THE

Supreme Court of the United States

October Term, 1977

No. 76-709

EARL L. BUTZ, *et al.*,

Petitioners,

v.

ARTHUR N. ECONOMOU, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION AND SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

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MOTION FOR LEAVE TO FILE A SUPPLEMENTAL MEMORANDUM

Respondents, by their attorneys, Law Offices of David C. Buxbaum, P.C., move this Court for leave to file a supplemental brief, a copy of which is attached hereto on the grounds that during oral argument the Court was inadvertently misinformed by opposing counsel as to the federal practice and authority in paying claims against federal employees.

A. Inadvertent Misinformation Imparted to the Court

During the oral argument of this action, attorney for the petitioners, Daniel M. Friedman, Esq., Deputy Solicitor General of the United States of America, was questioned

by the Court as to whether federal officials, subject to civil suit for actions within the scope of their authority, were reimbursed by federal authorities, if a court awarded damages against said defendants. To the best of attorney for respondents' recollection, attorney for petitioners responded that he had been informed that there was no authority for such reimbursement, and that consequently such reimbursement was not made.

Attorney for respondents believes that the Court was inadvertently misinformed in that such authority does exist and such reimbursement is, in fact, apparently commonly made.

Therefore, in the interests of justice and in order that the Court be fully and accurately presented with the facts prior to reaching a decision in this case, attorney for respondents has prepared a brief supplemental memorandum discussing, in outline form, this one limited issue. Said brief is submitted to this Court for its consideration.

B. Petitioners' Filing of a Reply Brief

As further reason for granting respondents' motion, counsel for respondents asserts that he did not receive petitioners' reply brief in this case until two days before the oral argument of this matter. (*Cf.*, Supreme Court Rule 41, paragraph "3".) Counsel for respondents had virtually no time to prepare the issues presented by said reply brief.

Respondents, therefore, pray that this Court permit respondents to file their supplemental memorandum, prepared only to rectify an inadvertent impression given the Court during oral argument.

Wherefore, respondents respectfully request that they be granted leave to file this supplemental brief and that the attached supplemental memorandum be accepted by the Court.

Dated: New York, New York
November 21, 1977

Law Offices of David C. Buxbaum, P.C.
Attorneys for Respondents

By: /s/ David C. Buxbaum
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SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

The Federal Government Routinely Defends Government Employees and Can and Does Immunize Them or Reimburse Them, or Pay for Judgments Rendered Against Them.

A. The Basis of Federal Authority in Assuming Responsibility for Payment of Damages Assessed Against Federal Officials for Civil Wrongs

"It has been held that where an officer or employee of the Government is sued because of some official act done in the discharge of an official duty the expense incurred by him in the discharge of such duties should be borne by the United

States. *See,* 15 Comp. Dec. 621; 9 Op. Atty. Gen. 51, 52; *id.,* 146, 148. *Cf.* 31 Comp. Gen. 246." Op. Comp. Gen. B-147769, 44 Comp. Gen. 312 (1964). *See also,* Jayson, *Handling Federal Tort Claims; Administrative and Judicial Remedies* (§ 178.02 1970 looseleaf); Schwartz and Jacoby, *Litigation With the Federal Government,* p. 287 (1970).

"[A] practical equivalent of sovereign immunity is to . . . reimburse [the official] for any judgment." *Litigation With the Federal Government, supra,* at p. 287. And, as far back as 1804, in *Little* v. *Barreme,* 6 U.S. (2 Cr.) 170 (1804), the Government "assumed the judgment, and paid it with interest and all charges." 9 Op. Atty. Gen. 51, 53.

This reimbursement is provided in at least two different ways—by withdrawing money from an appropriations account, Op. Comp. Gen. B-147769, 44 Comp. Gen. 312 (1964), or by having Congress pass a private bill, Jayson, *Handling Federal Tort Claims, supra,* at § 178.02.

B. Provision for Counsel in Civil Cases

In addition to eventually paying the judgment obtained against federal officials, the Government also invariably provides defense counsel for such officials, as was acknowledged by counsel for petitioners at oral argument. *See also,* Schwartz and Jacoby, *supra,* at 287 ("Another practical equivalent of sovereign immunity is to provide the officer with defense counsel. . . ."); Jayson, *supra,* at § 178.02 ("[T]he Department of Justice will *normally* appear and defend the employee, the United States Attorney acting as his lawyer. . . .") (emphasis supplied).[1]

[1] "This is done not by specific dictate of any statute, but pursuant to the [Justice] Department's general policy—*whenever* a government employee is sued in his personal capacity for acts done in the course of official duty, the [Justice] Department will, on his or his agency's request, appear and represent him in court. *Cf.* 28 U.S.C. § 507." *Id.* (Emphasis supplied.)

> ". . . it has been the uniform practice of the Federal Government, ever since its foundation, to take upon itself the defense of its officers who are sued or prosecuted for executing its laws. The following are some of the cases in which this has been done: *Mitchell* v. *Harmony,* 13 How., 115; *Elliott* v. *Swartwout,* 10 Pet., 137; *Tracy* v. *Swartwout,* 10 Pet., 80; *Lawrence* v. *Allen,* 7 How. 785; *Same* v. *Caswell,* 13 Howard, 488; *Greely* v. *Thompson,* 10 How., 225; *King* v. *Maxwell,* 17 How., 147; *The United States* v. *Guthrie,* 17 How., 284; *The United States* v. *Booth,* 18 How., 476; *Greely* v. *Burgess,* 18 How. 413; *Stairs* v. *Peaslee,* 18 How., 521; *Gelston* v. *Hoyt,* 3 Wheat, 247; *Fleming* v. *Page,* 9 How, 603; *Kendall* v. *The United States,* 12 Pet., 51; *Marbury* v. *Madison,* 1 Cr., 137." 9 Op. Atty. Gen. 51, 52-53 (1857).

This policy has continued to this day. *See, Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388, 391 (1971).

C. Provision for Counsel in Criminal Cases

Besides representing and reimbursing federal officials, the Justice Department has recently announced that it would, under certain circumstances, pay the legal fees of federal officials that it prosecutes criminally:

> "There may be circumstances in which, at the conclusion of criminal proceedings, it would be appropriate for the department to consider reimbursement of an employee for payments made to counsel in connection with those proceedings." *New York Times,* Sunday, November 13, 1977, p. 26.

D. Reimbursement by Use of Agency Appropriation

One example of the appropriation account method is the case of *Giancana* v. *Johnson,* 335 F.2d 372 (7th Cir. 1964), *cert. den.* 379 U.S. 1001 (1965), where a Federal Bureau of Investigation agent was ordered fined, and he was later reimbursed for the fine from the appropriation to the

Federal Bureau of Investigation for "Salaries and Expenses". Op. Comp. Gen. B-147769, 44 Comp. Gen. 312 (1964).

E. Reimbursement by Private Bill

The private bill alternative is also available, as is made clear by Jayson, *Handling Federal Tort Claims, supra,* where it is stated that:

> ". . . if the United States escapes liability on jurisdictional ground and judgment is obtained against the employee . . . there is a possibility that the employee's agency would support a private bill to indemnify or reimburse him for his monetary obligation to the claimant." at § 178.02 (footnote omitted).

The passage of such private relief bills is employed when federal officials are found liable for money damages.

> "In this respect the power of Congress is almost limitless. Its authority stems from the constitutional provision empowering it to pay the debts of the United States [Art. I § 8]. The Supreme Court has interpreted this power very broadly, as including debts or claims 'which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual.'" *Id.,* at § 21.01, quoting *United States* v. *Realty Co.,* 164 U.S. 427, 440-441 (1896) (footnotes omitted).[2]

[2] Some examples of such private bills reimbursing federal employees for judgments recovered against them as individuals acting within the scope of their duty are: Private Law 89-255, 80 Stat. 1630 (reimbursing an employee of the Agricultural Research Service of the United States Department of Agriculture for a compromise settlement in a suit brought against him); Private Law 89-263, 80 Stat. 1635 (reimbursing an employee of the Post Office Department for a judgment rendered against him); Private Law 89-287, 80 Stat. 1644 (reimbursing a United States Post Office Department employee for a judgment rendered against him).

F. Direct Private Bill Relief to Claimants

In addition to the above-mentioned involvements of the Federal Government, there is another use of the private bill which must be referred to. The

> ". . . private bill may provide or facilitate a remedy in many ways. It may remove an existing statutory bar to the claim as by waiving the statute of limitations; it may refer the claim to the chief commissioner of the Court of Claims for judicial investigation and report back to Congress; *it may confer jurisdiction on a federal court to hear and determine the claim where no such jurisdiction otherwise exists;* it may increase or remove entirely the ceiling on an agency's administrative settlement authority for purposes of a particular claim; it may authorize a government official to hear, determine, and settle claims arising out of a particular incident; *it may direct the payment of a sum certain to the claimant in satisfaction of the claim* or it may provide relief in still some other form." Jayson, *supra,* at § 21.01. (footnotes omitted) (emphasis supplied)

In *Mizokami* v. *United States,* 414 F.2d 1375, 1377 (Ct. Cl. 1969), the Court of Claims commented as follows concerning private relief laws conferring jurisdiction on that Court:

> "Past special jurisdictional acts can be placed on one of two general categories. One type of act is designed merely to waive some affirmative defense which the United States could presumably otherwise effectively plead. Such acts have waived defenses based on statutes of limitations as well as those based on the principles of res judicata.
>
> "The other type of act additionally embraces an admission of liability by the United States and leaves a greater or lesser number of the factual and legal

questions relating to damages for the court." (footnotes and citations omitted).

An example of a private bill directing payment directly to the claimant is Private Law 87-552, 76 Stat. 1359 (1962), directing payment of a sum of money to a claimant whose automobile was seriously damaged in a collision with an Army truck. Since the Army driver was outside the scope of his employment at the time, the claimant was not entitled to relief under the Federal Tort Claims Act. *See also,* Private Law 87-579, 76 Stat. 1369 (1962), awarding damages for injuries sustained by claimant while a patient in a United States Army Hospital in Korea.

G. Relief to Federal Officials by Amendments to the Federal Tort Claims Act

Another method by which the federal government assumes responsibility for suits against federal officials is by periodically broadening the coverage of the Federal Tort Claims Act. Such amendments are made after commencement of suits against a particular type of federal official.

1. *Federal Automobile Drivers*

For example, the Drivers' Liability Act, 28 U.S.C. § 2679 (b)-(e), added in 1961 by Pub.L. 87-258, 75 Stat. 539, as amended July 18, 1966, Pub.L. 89-506, § 5a, 80 Stat. 207, was passed

> ". . . in order to provide a method for the assumption by the Federal Government of responsibility for claims for damages against its employees arising from the operation by them of vehicles in the scope of their Government employment. . . . [T]o meet the problem of personal liability in suits for damages to which employees of the Federal Government are subject as a result of their operation of motor vehicles in the performance of official duties." 1961 U.S. Code Cong. and Admin. News, p. 2784, 2785.

2. *Federal Doctors and Dentists*

With the commencement of negligence and malpractice suits against doctors and dentists in federal employ, Congress quickly amended the Federal Tort Claims Act to include these officials.

For example, 38 U.S.C. § 4116 (added in 1965 by Pub.L. 89-311, as last amended October 21, 1976, Pub.L. 94-581, §§ 110(11), 209(a)(7), 210(c)(8)(A), 90 Stat. 2849, 2861, 2864, making suit against the United States Government the exclusive remedy in suits against certain medical officials, in order to protect medical personnel of the Department of Medicine and Surgery of the Veterans' Administration from malpractice and negligence suits brought against them for their acts or omissions while in the exercise of their duties, 1965 U.S. Code Cong. and Admin. News, p. 3925, 2938); 42 U.S.C. § 233 (added in 1970 by Pub.L. 91-623 § 4, 84 Stat. 1868, and renumbered November 18, 1971; Pub.L. 92-157 § 301(c), 85 Stat. 463, to immunize medical personnel of the Public Health Service from civil actions or proceedings for performance of surgical, dental or related functions while acting within the scope of their office or employment and making suit against the United States Government the exclusive remedy for such actions); 22 U.S.C. § 817 (added in 1976 by Pub.L. 94-350, § 119, 90 Stat. 827, "extending to State Department (and also AID) medical personnel protection against civil suits for acts of alleged medical malpractice performed while acting within the scope of their employment," 1976 U.S. Code Cong. and Admin. News, p. 1555, 1565).

3. *Law Enforcement Officers*

Similarly, law enforcement officers, who have been the subject of civil damage acts, were covered by the Federal

Tort Claims Act in 1974 by 28 U.S.C. § 2680(h) (added in 1974 by Pub.L. 93-253, 88 Stat. 50, in order to protect investigative and law enforcement officers by "provid[ing] a remedy against the United States for [their] *intentional* torts. . . ." 1974 U.S. Code Cong. and Admin. News, p. 2789, 2790) (emphasis supplied).

H. Recent Legislative Proposal to Congress

The Attorney General has recently proposed legislation "to amend Title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, and for other purposes." H.R. 9219; S. 2117.

In a letter to the Speaker of the House of Representatives, Mr. Bell stated that:

> "The purposes of the proposed legislation are threefold: first, to provide the victims of common law and 'constitutional torts' committed by federal employees with a remedy against a financially responsible defendant; second, to protect federal employees from suits for money damages arising out of the performance of their duties; and, third, to eliminate the need for the Department of Justice to hire private attorneys to represent individual federal employees against whom such suits might be brought."

The proposed legislation makes several amendments to Title 28 of the United States Code.

The major amendments pertain to expanding the coverage of the Federal Tort Claims Act by making the United States Government solely liable primarily for the so-called "constitutional torts" of its employees acting within the scope of their office or employment, or under the color thereof. The sections in which amendments have been proposed include 28 U.S.C. §§ 1346(b), 2672, 2675(a), 2679(b) and (d) and 2680(h).

CONCLUSION

As has been shown, the United States Government has the authority, which it generally exercises, to reimburse federal officials for damage judgments rendered against them. The means of exercising this authority includes provision for counsel in both civil and criminal cases, reimbursement by use of agency appropriation, reimbursement by private bill, and direct private bill relief to claimants, as well as relief to federal officials by amendments to the Federal Tort Claims Act. Moreover, the Department of Justice invariably defends such federal officials or reimburses the official for expenses incurred by said official in defending himself.

Therefore, it is respectfully submitted that even under present policy, the United States Government is almost invariably responsible for damage claims against federal officials, and thus said federal officials are not themselves required to pay for their own common law or "Bivens" type torts.

Dated: New York, New York
November 21, 1977

Respectfully submitted,

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